

APPEAL NO. 162362  
FILED JANUARY 18, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 8, 2016, in (city), Texas, with the record closing on August 29, 2016, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the (date of injury), compensable injury does not extend to L4-5 disc herniation, L5-S1 disc herniation, and L5 radiculopathy; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. KM) on May 18, 2015, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the appellant (claimant) reached MMI on May 6, 2015; and (4) the claimant's IR is five percent.

The claimant appealed all of the hearing officer's determinations, contending that the evidence did not support the hearing officer's determinations. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

**DECISION**

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), at least in the form of a lumbar sprain, right shoulder rotator cuff tear, and bilateral knee internal derangement and that the statutory date of MMI is March 8, 2016. The claimant testified she was injured when she tripped over boxes and fell face down.

**EXTENT OF INJURY**

The hearing officer's determination that the (date of injury), compensable injury does not extend to L4-5 disc herniation, L5-S1 disc herniation, and L5 radiculopathy is supported by sufficient evidence and is affirmed.

**FINALITY**

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR

certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both.

In the Discussion portion of the decision the hearing officer stated the evidence indicated that a notice of Dr. KM's May 18, 2015, MMI/IR certification was delivered to the claimant's residence for pickup on June 2, 2015, and that the certification was available for pickup until June 29, 2015. The hearing officer found in Finding of Fact No. 7 that Dr. KM's MMI/IR certification was provided to the claimant by verifiable means on June 2, 2015, and found in Finding of Fact No. 8 that the claimant did not timely pick up the United States Postal Service (USPS) certified mail package, and therefore she was "deemed to have received [Dr. KM's] certification by June 7, 2015." We note that neither Section 408.123 nor Rule 130.12 provide for a deemed receipt of the first valid MMI/IR certification; therefore, Finding of Fact No. 8 is wrong as a matter of law.

In evidence is a Notification of [MMI]/First Impairment Income Benefit Payment (PLN-3) dated May 28, 2015, from the carrier to the claimant notifying the claimant of Dr. KM's May 18, 2015, MMI/IR certification and states that Dr. KM's MMI/IR certification was attached to the notice. Also in evidence was a copy of a USPS certified mail return receipt request form or "green card" listing the claimant's correct address in (city 2), Texas as testified to by the claimant at the CCH. In evidence is a USPS tracking sheet which correlates with the green card receipt number that shows the letter was accepted by a USPS facility on June 2, 2015, in Illinois, arrived at a North (city) USPS facility on June 4, 2015, and unclaimed by the claimant with a maximum time expiring on June 24, 2015, at a (city 2) USPS facility. Also in evidence is a copy of an envelope containing a date of June 27, 2015, that correlates with the green card receipt number and shows notations of "return to sender" and "unable to forward." The green card listing the claimant's address shows a return date stamp of July 6, 2015. The evidence does not establish that Dr. KM's MMI/IR certification was provided to the claimant on June 2, 2015; the evidence reflects that on June 2, 2015, Dr. KM's MMI/IR certification was in a USPS facility in Illinois, and did not arrive in (city), Texas, until after that date. The hearing officer's finding that Dr. KM's MMI/IR certification was provided to the claimant by verifiable means on June 2, 2015, is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's determination that the first MMI/IR certification assigned by Dr. KM on May 18, 2015, became final under Section 408.123 and Rule 130.12.

Based on the evidence presented, there are different dates on which the claimant could have received Dr. KM's May 18, 2015, MMI/IR certification; therefore, we do not find it appropriate to render a decision as to when, or if, the claimant received Dr. KM's MMI/IR certification by verifiable means. Accordingly, we remand the issue of whether the first MMI/IR certification assigned by Dr. KM on May 18, 2015, became final under Section 408.123 and Rule 130.12 to the hearing officer for further action consistent with this decision.

### **MMI/IR**

The hearing officer determined that the claimant reached MMI on May 6, 2015, with a five percent IR because she determined that Dr. KM's May 18, 2015, MMI/IR certification became final. Because we have reversed the hearing officer's determination that Dr. KM's May 18, 2015, MMI/IR certification became final and have remanded that issue to the hearing officer, we also reverse the hearing officer's determinations that the claimant reached MMI on May 6, 2015, with a five percent IR, and we remand those issues to the hearing officer for further action consistent with this decision.

Pursuant to Section 410.203(c), the Appeals Panel may not remand a case more than once. Given that we are remanding this case on the issue of whether Dr. KM's May 18, 2015, MMI/IR certification became final as well as the issues of MMI and IR, we note that there are possible discrepancies in some of the MMI/IR certifications in evidence, depending upon how the hearing officer determines the issue of whether Dr. KM's May 18, 2015, MMI/IR certification became final.

Dr. KM examined the claimant on May 12, 2015, and in his DWC-69 dated May 18, 2015, certified that the claimant reached MMI on May 6, 2015, with a five percent IR. Dr. KM considered a right shoulder contusion, right shoulder rotator cuff tear, lumbar sprain/strain, and knee contusion. As noted above, the parties stipulated that the compensable injury includes a lumbar sprain, right shoulder rotator cuff tear, and bilateral knee internal derangement. Dr. KM does not consider the stipulated condition of bilateral knee internal derangement.

There are three other MMI/IR certifications in evidence, which are all from (Dr. P), the designated doctor. Dr. P examined the claimant on January 27, 2015, and certified in her DWC-69 that the claimant reached MMI on April 21, 2015. Dr. P did not indicate on the DWC-69 an IR or that the claimant had no permanent IR. In her attached narrative report Dr. P opined that the claimant had not reached MMI but was expected to do so on April 21, 2015. The hearing officer correctly noted that Dr. P's MMI/IR certification was not a valid MMI/IR certification, because Dr. P's MMI/IR

certification did not assign an IR or indicate that the claimant had no permanent impairment. See Appeals Panel Decision (APD) 100636-s, decided July 16, 2010.

The hearing officer sent Dr. P a letter of clarification noting the discrepancies contained in her DWC-69, and requested her to provide an amended DWC-69. Dr. P provided an amended DWC-69 dated March 29, 2016, certifying the claimant had not reached MMI. The hearing officer sent Dr. P another letter of clarification on April 27, 2016, noting that statutory MMI was March 8, 2016, and requested Dr. P to provide an amended DWC-69 taking into account the statutory MMI date. Dr. P responded and stated that she needed to reexamine the claimant.

Dr. P's reexamination occurred on June 28, 2016, and in a DWC-69 dated July 14, 2016, Dr. P certified that the claimant reached MMI on August 12, 2015, with an eight percent IR. Dr. P's narrative report makes clear that she considered only the conditions of a lumbar sprain, right shoulder rotator cuff tear, and bilateral knee internal derangement as stipulated to by the parties.

### **SUMMARY**

We affirm the hearing officer's determination that the (date of injury), compensable injury does not extend to L4-5 disc herniation, L5-S1 disc herniation, and L5 radiculopathy.

We reverse the hearing officer's determination that the first MMI/IR certification assigned by Dr. KM on May 18, 2015, became final under Section 408.123 and Rule 130.12, and we remand this issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determinations that the claimant reached MMI on May 6, 2015, with a five percent IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

On remand the hearing officer is to determine whether the claimant received Dr. KM's May 18, 2015, MMI/IR certification by verifiable means. If the hearing officer determines that the claimant did receive that MMI/IR certification by verifiable means, the hearing officer is to make findings of fact and conclusions of law on the date the claimant received Dr. KM's May 18, 2015, MMI/IR certification, and the date that the claimant disputed that MMI/IR certification that is consistent with the evidence. The hearing officer is then to make findings of fact, conclusions of law, and a decision whether Dr. KM's May 18, 2015, MMI/IR certification became final under Section

408.123 and Rule 130.12. The hearing officer is then to make findings of fact, conclusions of law, and a decision regarding the claimant's MMI, which cannot be after the statutory date of March 8, 2016, and the claimant's IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **HARTFORD UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1999 BRYAN STREET, SUITE 900  
DALLAS, TEXAS 75201-3136.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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K. Eugene Kraft  
Appeals Judge

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Margaret L. Turner  
Appeals Judge